IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 13, 2005 Session

IN RE T.L., N.L., & D.L.

Appeal from the Juvenile Court for Loudon County
No. 16619J William H. Russell, Judge

No. E2004-02615-COA-R3-PT - FILED OCTOBER 31, 2005

The trial court terminated the parental rights of a mother and the two fathers of her three children.[1] As to the fathers, the court terminated the rights of C.L.R. ("Father1") with respect to his minor child, T.L. (DOB: September 4, 1997) and the rights of D.F. ("Father2") with respect to his minor children, N.L. (DOB: September 16, 1999) and D.L. (DOB: September 11, 2000). Both fathers appeal, arguing, *inter alia*, that the evidence preponderates against the trial court's dual findings – said by the trial court to be made by clear and convincing evidence – that grounds for termination exist and that termination is in the best interest of the children. We affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part; Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Jere Franklin Ownby III, Knoxville, Tennessee, for the appellant, C.L.R.

Gary Fox, Lenoir City, Tennessee, for the appellant, D.F.

Paul G. Summers, Attorney General and Reporter, Douglas Earl Dimond, Senior Counsel, and Amy T. Master, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I.

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[1] The mother was never married to either of the fathers.

On January 9, 2002, the Department of Children's Services ("DCS") filed a petition for temporary custody of T.L., N.L., and D.L. (collectively "the children"). The petition alleges that the children were dependent and neglected in that they had been physically abused by their mother's boyfriend.[2] Upon the filing of the petition, the trial court entered an order placing the children's temporary custody with DCS.

In February, 2002, paternity tests conclusively showed that Father1 was the father of T.L. and that Father2 was the father of N.L. and D.L. As a result of these tests, the trial court ordered both fathers to pay child support and granted them reasonable visitation rights with respect to their respective child(ren).

On June 9, 2003, DCS filed a petition to terminate the parental rights of Father1 and Father2, as well as the mother of the children, S.L.[3] The trial court received evidence on July 30, 2004, and September 20, 2004. On October 6, 2004, the court entered its order, finding, by clear and convincing evidence, that grounds for terminating the parental rights of Father1 and Father2 existed and that termination was in the best interest of the children. Specifically, the court made the following findings with respect to Father1:

> That [Father1] abandoned [T.L.] in that he was aware that [T.L.] was in the custody of [DCS] [in] January 2002 and had no visitation at all with this child from January 2002 until his incarceration at the end of March 2003.
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> That [Father1] never entered into a permanency plan with [DCS] prior to or after incarceration.
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> That [DCS] made reasonable efforts to prevent removal of the child or the child's situation prevented reasonable efforts from being made prior to the removal pursuant to Exhibit number twelve (12) and the testimony of [Father2] that [T.L.] received services in Putnam County in the year 2000 through 2001 provided by [DCS] through their agents.
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> Since the child came into care, January 2002, [DCS] did have contact with [Father1] and he was advised of the Court hearing on February 11, 2002 and he indicated he did not know if he would attend but he would send his mother[;] that the mother of [Father1] testified she did not attend the February hearing but that the sister of [Father1] did

[2] He was neither of the fathers in the instant case.

[3] The parental rights of the children's mother, S.L., were terminated by entry of a default judgment on September 1, 2004. She did not appeal the termination of her rights.

attend. Therapeutic visitation services were provided by [DCS]. [DCS] discussed the permanency plan with [S.L.] and her requirements. [DCS] began an ICPC for placement of the child with the maternal grandmother . . . in the state of Wisconsin. That the child has been in counseling and has received therapy. That [Father1] demonstrated a lack of concern for the child to such a degree that it appears unlikely that he will be able to provide a suitable home for the child at an early date. This was demonstrated by no contact between [Father1] and the child prior to and for several months after [the] filing of the Petition for Termination of Parental Rights. That [Father1] made no reasonable efforts prior to his incarceration. TCA 36-1-113(g)(1), TCA 36-1-102(1)(A)(ii) and TCA 37-1-166(g)(1)(2)(3).

That the child has been removed by order of the Court for six months and other conditions persist which in all probability would cause the child to be subjected to further abuse and neglect and which, therefore, prevent the children's [sic] return to the care of [Father1]; there is little likelihood that these conditions will be remedied at an early date so that these child [sic] can be returned to [Father1] in the near future; the continuation of the legal parent and child relationship greatly diminishes the child's chances of early integration into a stable and permanent home. TCA 36-1-113(g)(3)(A)(i)(ii)(iii). This was demonstrated by [Father1] by his own testimony that he had relied on [S.L.] to work her permanency plan so that he would be able to see the child, that he was aware that his child was in custody of the State in January 2002 and he had no contact with [DCS] from February 2002 until his attorney filed a motion for continuance of the termination of parental rights trial October 2003. That [Father1] plead guilty to C-Felony aggravated assault and received an eight-year sentence November 13, 2002 in Roane County, Tennessee. That [Father1] was to report to jail December 2, 2002 for incarceration and was told to come back which he failed to do. By his own testimony he was "on the lamb" and hid from the law until March 2003 when he began his incarceration. By choice [he] was not employed and paid no child support except $100.00 from December 2002 through March 2003.

Prior to his current incarceration, [Father1] engaged in conduct, which exhibits a wanton disregard for the welfare of the child in that he hid from law enforcement to avoid prison and he made no efforts to visit the child prior to incarceration.

> It is [in] the best interest of [T.L.] that all of the parental rights of [Father1] be terminated. That there has not been a bond established between this child and [Father1] as demonstrated by the lack [of] visitation and Exhibit 9[,] a letter from [Father1] to [T.L.] in which he acknowledges he does not know this child. That by hiding from law enforcement to avoid prison it is apparent [Father1] has not made an adjustment of circumstances, conduct or conditions as to make it safe and in the child's best interest to be in the home of the foster parents [sic]. That prior to his incarceration [Father1] made no efforts to effect a lasting adjustment after reasonable efforts by available social services agencies for such a period of time that lasting adjustment does not appear possible. That there is no bond between [Father1] and [T.L.]. That the effect a change of caretakers and physical environments would likely have on the child's emotional[,] psychological and medical condition would be negative in that the child has been with the foster parents for over one year, that the foster parents['] testimony describing this child's needs for stability, safety and continued contact between the siblings which has been provided by the foster parents and [DCS] is critical and, that the foster parents testified they would love to adopt this child if he becomes available and would continue to provide a family for the child. That a change of caretakers would disrupt the progress the child has made. TCA 36-1-113(g)(8)(B)(ii) and TCA 36-1-113(i)(1-9)[.]

(Paragraph numbering in original omitted). As to Father 2, the trial court found as follows:

> That [Father2] abandoned [N.L. and D.L.] in that he had three (3) supervised visits with these children between January 2, 2002 and June 9, 2003. That he had no further contact with [DCS] until September 19, 2003 when he was contacted by the case manager. That the visitation [Father2] had with his children during the first sixteen (16) months of their custody was no more than token visitation. TCA 36-1-113(g)(1) and TCA 36-1-102(1)(A)(i)[.]
>
> That between December 2003 and July 2004 [Father2] did visit his children but [sic] these visits were regular but did not create a meaningful relationship between parent and children.
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> That [Father2] by his own testimony was aware of the criteria and procedures for termination of parental rights by his signature on [the] Permanency Plan on January 29, 2003 and April 11, 2004.

That [DCS] made reasonable efforts to prevent removal or the children's situation prevented reasonable efforts from being made prior to the removal pursuant to Exhibit number twelve (12) and the testimony of [Father2] that he received services in Putnam County in the year of 2000 through 2001 provided by [DCS] through their agents. Since the children have come into care, January 2002, [DCS] did have contact with [Father2] and he was advised of the Court hearing on February 11, 2002. Therapeutic visitation services were provided by [DCS]. [DCS] discussed the permanency plan with [S.L.] and her requirements. [DCS] began an ICPC for placement of the children with the maternal grandmother . . . in the state of Wisconsin. That the children have been in counseling and have received therapy. That [Father2] demonstrated a lack of concern for the children to such a degree that it appears unlikely that they [sic] will be able to provide a suitable home for the children at an early date. This was demonstrated by the long periods of no contact between [Father2] and the children prior to and for several months after [the] filing of the Petition for Termination of Parental Rights. The on again, off again pattern of [Father2]'s contact with [DCS] and this Court reiterated his lack of concern for his children. TCA 36-1-113(g)(1), TCA 36-1-102(1)(A)(ii) and TCA 37-1-166(g)(1)(2)(3).

That the children have been removed by order of the Court for six months and other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of [Father2]; there is little likelihood that these conditions will be remedied at an early date so that these children can be returned to [Father2] in the near future; the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home. TCA 36-1-113(g)(3)(A)(i)(ii)(iii). This was demonstrated by [Father2] by his own testimony that he had relied on [S.L.] to work her permanency plan so that he would be able to see the children, that he was aware that his children were in custody of the State in January 2002 and he had no contact with [DCS] from February 2002 until [DCS] contacted him in August 2002, that his next contact wasn't until January of 2003[,] that he agreed to work a permanency plan in January 2003 and failed to do so, that he visited his children three times in the first sixteen months of their foster care and that [he] discontinued his visits after April 17, 2003 and had no further contact with [DCS] or his children until September 2003 when he was called by the case manager.

> Despite frequent explanations of the statement of responsibilities set out in periodic foster care plans prepared for and signed by [Father2], he has failed to comply in [a] substantial manner with those reasonable responsibilities related to remedying the conditions which necessitate foster care placement. TCA 36-1-113(g)(2). That the requirements of the permanency plans for [Father2] were basically unchanged during the period since the children came into care. That [Father2] presented documentation set out in collective Exhibit 14 of his completion of the requirements of the permanency plan. That all of the documentation was for July 2004. That the last minute efforts of [Father2] to comply with the permanency plan indicate he has not made a long-term commitment to resolve the issues, which continued his involvement with [DCS]. That taking a four-hour parenting class was inadequate. That by his testimony, [Father2] had signed up for a nine week parenting class [in] March 2003 and did not attend. Further it is shown by the July efforts that [Father2] could have completed his permanency plan in the 2-1/2 years preceding this trial.
>
> It is [in] the best interest of [D.L.] and [N.L.] that all of the parental rights of [Father2] be terminated. That [Father2]'s last minute efforts to work his Permanency plan show that he has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such a duration of time that lasting adjustment does not reasonabl[y] appear possible; that in the first sixteen months [Father2] had three visits with his children and that the visitation during the entire 31 month period prior to this trial were [sic] token visits. That there has not been a bond established between these children and [Father2] as demonstrated by the visitation as described by the case manager and [Father2]. That the effect a change of caretakers and physical environments would likely have on the children's emotional[,] psychological and medical condition would be negative in that the children have been with the foster parents for over one year, that the foster parents['] testimony describing these children's needs for stability, safety and continued contact between the siblings which has been provided by the foster parents and [DCS] is critical and, that the foster parents testified they would love to adopt these children if they become available and would continue to provide a family for the children. That a change of caretakers would disrupt the progress the children have made. TCA 36-1-113(g)(8)(B)(ii) and TCA 36-1-113(i)(1-9)[.]

(Paragraph numbering in original omitted). From this order, both Father1 and Father2 appeal.

II.

Our review of this non-jury case is *de novo*; however, the record comes to us accompanied by a presumption of correctness as to the trial court's factual findings that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). No presumption of correctness attaches to the lower court's conclusions of law. ***Jahn v. Jahn***, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

III.

It is well-established that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

Tenn. Code Ann. § 36-1-113(g) lists the grounds upon which parental rights may be terminated; "the existence of any one of the statutory bases will support a termination of parental rights." ***In re C.W.W.,*** 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). The issues raised in the pleadings, and the trial court's findings, implicate the following statutory provisions:

Tenn. Code Ann. § 37-1-147 (2005)

> (a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.
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> * * *

Tenn. Code Ann. § 36-1-113 (2005)

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.
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> * * *

(c) Termination of parental or guardianship rights must be based upon:

(1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and

(2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in [Tenn. Code Ann.] § 36-1-102, has occurred;

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

* * *

Tenn. Code Ann. § 36-1-102 (2005)

As used in this part, unless the context otherwise requires:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date;

* * *

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior

to incarceration that exhibits a wanton disregard for the welfare of the child; . . .

* * *

(C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;

* * *

(E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;

* * *

Tenn. Code Ann. § 37-2-403 (2005)

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care. . . .

* * *

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. . . .

* * *

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights, ...

IV.

A.

We will first address the case against Father1, who raises the following three issues: (1) whether grounds for terminating his parental rights were supported by clear and convincing evidence; (2) whether DCS made reasonable efforts to reunite Father1 with T.L.; and (3) whether termination of Father1's parental rights is in the best interest of T.L.

B.

Father1 first contends that none of the grounds upon which the trial court relied to terminate his parental rights were proven by clear and convincing evidence. We disagree with this broad statement.

The trial court based the termination of Father1's parental rights on three grounds: (1) abandonment by failure to visit; (2) abandonment due to a wanton disregard for the welfare of the child; and (3) failure to remedy persistent conditions. Father1 takes issue with each of these findings. In addition, Father1 argues that the trial court erroneously based its termination decision on Father1's failure to enter into a permanency plan.

We begin our analysis by discussing the last point made by Father1. We note that the trial court merely found that Father1 never entered into a permanency plan, a fact which is undisputed. The trial court did not, however, make a finding that Father1 failed to substantially comply with a permanency plan, under Tenn. Code Ann. § 36-1-113(g)(2), nor did the court state that the failure to enter into a plan was a basis for termination. Accordingly, Father1's point of contention with respect to a permanency plan is found to be without merit.

With respect to the failure to remedy persistent conditions, pursuant to Tenn. Code Ann. § 36-1-113(g)(3), the trial court did rely on this statute as a basis for terminating Father1's parental rights. However, DCS, at oral argument, stated that, while it agreed with the trial court, it recognized that case authority was against the trial court's position. *See* ***In the matter of D.L.B.***, No. W2001-02245-COA-R3-CV, 2002 WL 1838147, at *9 (Tenn. Ct. App. W.S., filed August 6, 2002), *rev'd on other grounds,* 118 S.W.3d 360 (Tenn. 2003). Because of the ***D.L.B.*** case, we conclude that the trial court erred in basing termination of Father1's rights on the ground of failure to remedy persistent conditions. Hence, that ruling is reversed.

As to abandonment, the trial court found that Father1 abandoned T.L. by willfully failing to visit the child in the four months preceding Father1's incarceration and for engaging in conduct prior to incarceration which exhibited a "wanton disregard" for the child's welfare, pursuant, respectively, to Tenn. Code Ann. § 36-1-113(g)(1) and Tenn. Code Ann. § 36-1-102(1)(A)(iv). The evidence does not preponderate against either of these findings.

There is no question that Father1 knew his child was in the custody of DCS as of February, 2002, when the paternity test results proved that he was T.L.'s father. However, as stated by DCS, Father1 "made no meaningful effort to visit the [child] at any time prior to his incarceration [in March, 2003]." Father1 claims that, upon learning that he was T.L.'s father, he immediately went

to DCS in an attempt to schedule visitation; Father1 also asserts that he was told that someone from DCS would "get back to him." Father1 claims that he"wait[ed] in vain for months to be contacted by DCS," before finally making a second attempt to obtain visitation. We agree with DCS that these attempts were not meaningful. The fact that Father1 sat on his visitation rights rather than actively and persistently pursuing them belies his contention that he made a real effort to visit his son. The evidence does not preponderate against the trial court's finding that Father1 abandoned his son by willfully failing to visit him.

Second, the evidence does not preponderate against the trial court's finding that Father1 engaged in conduct prior to incarceration which exhibited a wanton disregard for his son. The evidence is undisputed that Father1 never visited his son, and Father1 even admitted at trial that he only made three telephone calls to DCS to inquire about his son, none after the summer of 2002. Father1 was charged with aggravated rape in November, 2002, and he pleaded guilty to and was convicted of aggravated assault, receiving an eight-year sentence. He was scheduled to begin serving his sentence on December 2, 2002, but when he reported to start his period of incarceration, he was told, due to some confusion over paperwork, that he would have to come back at a later date. When no one contacted him about returning to jail, Father1 decided to live inconspicuously until he ultimately turned himself in at the end of March, 2003. This conduct on the part of Father1 is inconsistent with a due regard for his son; rather, it clearly shows a wanton disregard for the child's welfare.

In an effort to bolster his argument on the issue of abandonment, Father1 states that he consistently paid child support for T.L., an action which he claims undermines the trial court's finding of abandonment. First, by his own admission, Father1 did not make any child support payments after December 10, 2002. This was not because he was physically unable to work, but rather because he was attempting to live inconspicuously to avoid time behind bars. Second, in order to avoid the ground of abandonment, a parent must support his children *and* visit them; it is not an either/or situation. The fact that Father1 paid child support for several months does not negate a finding of abandonment for failure to visit.

Father1 also contends that the trial court erred in failing to provide him with legal counsel during the dependency and neglect proceedings, pursuant to Tenn. R. S. Ct. 13 § (1)(a)(1)(d)(2)(B).[4]

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[4]Tenn. R. S. Ct. 13 § 1(a)(1)(d) provides, in pertinent part, as follows:

> (2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and . . . requests appointment of counsel.
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> * * *
>
> (B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or

(continued...)

This contention is without merit for a number of reasons. First, the Supreme Court rule upon which Father1 relies states that the right to counsel in a dependency and neglect proceeding is applicable only to a party to that proceeding. In the instant case, only S.L., the child's mother, was a party to the subject proceedings; Father1 was not. Accordingly, Father1 was not entitled to counsel at that time. Second, this Court has held that any violation of due process in dependency and neglect proceedings may be cured by a subsequently-pursued petition to terminate parental rights. *See* ***In re S.Y.***, 121 S.W.3d 358, 366 (Tenn. Ct. App. 2003). Finally, while the advice of counsel is important in many situations, the inability to secure the advice of court-appointed counsel can hardly be a justification for not visiting or not seeking to visit one's child.

C.

Father1 next asserts that DCS did not make reasonable efforts to reunite the child with him. We disagree.

Though DCS notified Father1 of court hearings, foster care review board meetings, and permanency plan staffings, Father1 failed to attend any of them. By his own admission, Father1 made only three telephone calls to DCS about his son, none after the summer of 2002. In February, 2004, upon learning of the existence of Father1's mother, DCS even met with her to explore the possibility of placing T.L. with her. Following a home study of the child's grandmother, DCS determined that T.L. should remain with his foster parents. Certainly this constitutes reasonable efforts on the part of DCS. *See* Tenn. Code Ann. § 36-1-113(i); ***State Dep't of Children's Servs. v. Malone***, No. 03A01-9706-JV-00224, 1998 WL 46461, at *2 (Tenn. Ct. App. E.S., filed February 5, 1998). The evidence does not preponderate against the trial court's findings on this issue.

D.

Finally, Father1 argues that the trial court erred in finding, by clear and convincing evidence, that termination was in the best interest of T.L. We find no error in the trial court's ruling.

As found by the trial court, Father1 hid from law enforcement in order to avoid incarceration, demonstrating that Father1 has failed to make an adjustment of circumstances such that it would be in the child's best interest to be in Father1's home. *See* Tenn. Code Ann. § 36-1-113(i)(1). Without question, Father1, prior to his incarceration, failed to effect a lasting adjustment after reasonable efforts by DCS. *See* Tenn. Code Ann. § 36-1-113(i)(2). Father1 never visited the child. *See* Tenn. Code Ann. § 36-1-113(i)(3). Father1's utter failure to visit the child, as well as his explicit acknowledgment that he does not know the child, demonstrates that no meaningful relationship has been established with the child. *See* Tenn. Code Ann. § 36-1-113(i)(4). A change of caretakers and physical environment would likely have a negative impact on the child's emotional and psychological condition, as the child has been with his foster parents for over a year, and the foster

[4](...continued)
neglected or in terminating parental rights;

parents testified concerning the child's need for a safe and stable home. *See* Tenn. Code Ann. § 36-1-113(i)(5). Moreover, the foster parents testified about their interest in adopting T.L., should he become available for adoption.

Accordingly, we conclude that the evidence does not preponderate against the trial court's findings by clear and convincing evidence that the termination of Father1's parental rights is in the best interest of the child.

V.

We now turn our attention to the case against Father2. He raises four issues for our consideration: (1) whether the trial court erred in finding clear and convincing evidence of abandonment; (2) whether the trial court erred in finding clear and convincing evidence of failure to substantially comply with a permanency plan; (3) whether DCS made reasonable efforts to reunite Father2 with his children; and (4) whether the trial court erred in finding clear and convincing evidence that termination was in the best interest of the children.

A.

First, Father2 contends that the trial court erred in finding clear and convincing evidence that Father2 abandoned his children. While Father2 acknowledges that he only visited the children twice in the four-month period prior to the filing of the petition to terminate, he claims that getting any visitation with the children was "like pulling teeth" and, therefore, his two visits should not be categorized as token. We disagree.

The statute defines "token visitation" as "visitation [which], under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." Father2's March, 2003, visit, according to the children's case manager, was very awkward, and the children did not acknowledge that they knew their father. That visit lasted only an hour. According to the case manager, the April, 2003, visit was substantially the same as the previous visit. There is no evidence in the record that Father2 requested other visitation with the children. On the contrary, the children's case manager testified that, while Father indicated in January, 2003, that he wished to exercise visitation with the children, he did not contact DCS for two months. Certainly, two hour-long visits over four months constitute visitation "of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child[ren]"; accordingly, we find the evidence does not preponderate against the trial court's finding that Father2 merely engaged in token visitation and, thus, abandoned his children by the willful failure to visit. Contrary to Father2's assertion, the fact that he visited the children twice in the applicable four-month period is not enough to negate a finding of abandonment. The statute specifically states that the "willful failure to visit" means the failure to engage in anything more than token visitation. *See* Tenn. Code Ann. § 36-1-102(1)(E). Since we have found the trial court's ruling on token visitation is supported by the evidence, it follows that Father2's contention regarding his "visitation" is without merit.

Father2 argues, in the alternative, that even if he abandoned his children by failing to exercise other than token visitation, he repented of his abandonment by establishing regular visitation in October, 2003. This position ignores the clear proscription of Tenn. Code Ann. § 36-1-102(1)(F)(2005), which states that

> [a]bandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights . . . .

The statute prevents Father2 from successfully advancing his argument pertaining to repentance.

B.

Next, Father2 argues that the trial court erred in finding clear and convincing evidence that he failed to substantially comply with his permanency plan. We agree with his argument on this point.

The permanency plan developed for Father2 required that he do the following: (1) complete a drug and alcohol assessment and follow all recommendations of that assessment; (2) allow DCS to complete a home study; (3) maintain stable housing for at least 6 months; (4) provide for the basic needs of his children; (5) complete an approved parenting class; (6) schedule visitation with the children; (7) maintain contact with DCS; and (8) resolve all legal issues. Tenn. Code Ann. § 36-1-113(g)(2) does not require *total* and *complete* compliance with a permanency plan; rather, it requires *substantial* compliance. Of the eight requirements of this plan, Father2 completed six: (1) he completed the required drug and alcohol assessment, and was not given any recommendations as a result of the assessment; (2) he allowed DCS to complete the home study; (3) he maintained stable housing for more than the required time-period; (4) he provided for the basic needs of the children; (5) he scheduled and maintained visitation with the children beginning in November, 2003; and (6) he resolved his legal issue, which involved reinstatement of his driver's license. It appears that Father2 failed to maintain an appropriate amount of contact with DCS, and while he did not complete the parenting class DCS wanted him to take, he did complete a four-hour program. Father2 testified that the program he originally planned to take – which was approved by DCS – conflicted with his work schedule, which resulted in his completing the shorter class. Since Father2 lost his job of eleven years because his employer could not accommodate his visitation schedule with the children, it is unfair to hold it against him that he took a parenting class that would accommodate his work schedule once he found a new job. In its brief before this court, DCS only takes issue with Father2's failure to complete a longer parenting class and his failure to complete the alcohol and drug assessment until three days before trial, even though he had two and one-half years to comply with the plan.

We find that the evidence preponderates against the trial court's finding that Father2 failed to *substantially* comply with the permanency plan. On the contrary, we hold that, in this case, completion of six of the eight required elements constitutes substantial compliance, and with respect to the parenting class, we find that Father2 complied with the requirement to the best of his ability, given his circumstances. Accordingly, we reverse the trial court's finding of this ground for termination.

C.

Father2 next asserts that DCS did not make reasonable efforts to reunite him with his children. In support of his contention, Father2 relies on Tenn. Code Ann. § 37-1-166.[5] This court has previously held that, with respect to the reasonable efforts of DCS in a termination case, the proper code provision is Tenn. Code Ann. § 36-1-113(i)(2) (2005). *See* ***In re A.W.***, 114 S.W.3d 541, 545 (Tenn. Ct. App. 2003). Tenn. Code Ann. § 36-1-113(i)(2) provides as follows:

> In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> * * *
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

The evidence in the record is clear that DCS made reasonable efforts to assist Father2 with his parenting skills in order to facilitate the return of his children. The children's case manager informed Father2 of the January, 2002, custody hearing, but Father2 did not attend. The case manager also invited Father2 to attend the initial permanency plan staffing, but he failed to do so. Father2 even admitted that, upon learning of the requirement of entering into a permanency plan, he felt "gun shy" about the process, which prompted him to have no contact with DCS for the next six months. When he finally did contact DCS in August, 2002, he did not request visitation with the children. He did not contact DCS again until January 29, 2003, at which time he finally attended a permanency plan staffing. At that time, he entered into a permanency plan, and the children's case manager even offered to help Father2 set up the necessary appointments so he could complete his requirements under the plan, but Father2 failed to take advantage of this offer of assistance. As we

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[5] Tenn. Code Ann. § 37-1-166 (2005) provides, in pertinent part, as follows:

> (a) At any proceeding of a juvenile court, prior to ordering a child committed to or retained within the custody of [DCS], the court shall first determine whether reasonable efforts have been made to:
>
> (1) Prevent the need for removal of the child from such child's family; or
>
> (2) Make it possible for the child to return home.
>
> (b) Whenever a juvenile court is making the determination required by subsection (a), [DCS] has the burden of demonstrating that reasonable efforts have been made to prevent the need for removal of the child or to make it possible for the child to return home.

have previously stated, "[t]he statute does not require a herculean effort on the part of DCS," but rather that DCS "make 'reasonable efforts.'" ***Malone***, 1998 WL 46461, at *2. Accordingly, the evidence does not preponderate against the trial court's finding that DCS made reasonable efforts to reunite Father2 with his children.

D.

Finally, Father2 argues that the trial court erred in finding, by clear and convincing evidence, that termination was in the best interest of the children. The factors a court must consider when deciding whether termination is in a child's best interest are set forth in Tenn. Code Ann. § 36-1-113(i) (2005):

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> * * *
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to [Tenn. Code Ann.] § 36-5-101.

In its brief before this court, DCS openly admits that "[t]he most difficult issue in this case is whether termination of [Father2]'s parental rights [is] in his children's best interest." DCS acknowledges that Father2 "to some extent adjusted his circumstances" by visiting the children regularly beginning in the fall of 2003. In fact, the only best interest factor that DCS relies upon is the "effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition." DCS contends that such a change would be detrimental to both children, as both children have greatly improved while in the care of their respective foster parents.

We hold that the evidence preponderates against the trial court's finding that there is clear and convincing evidence (1) that Father2 has failed to effect a lasting adjustment after reasonable efforts by available social services agencies, and (2) that Father2 has failed to establish a bond with the children. *See* Tenn. Code Ann. § 36-1-113(i)(2) & (4). Father2 unquestionably made a change in his behavior by establishing regular visitation with the children in the fall of 2003, and he completed substantially all of the requirements of his permanency plan. In addition, the evidence in the record preponderates that Father2's relationship with the children had improved as his visits with them progressed. There is nothing in the record to indicate that it would be unsafe for the children to be in Father2's home. *See* Tenn. Code Ann. § 36-1-113(i)(1) & 7. Father2 re-established regular visitation with the children. *See* Tenn. Code Ann. § 36-1-113(i)(3). There is nothing in the record to indicate that Father2's mental or emotional status would be detrimental to the children. Tenn. Code Ann. § 36-1-113(i)(8). Finally, Father2 consistently paid child support. Tenn. Code Ann. § 36-1-113(i)(9).

Taking all of this evidence into account, we cannot say that the evidence clearly and convincingly demonstrates that termination of Father2's parental rights is in the best interest of the children. We therefore reverse the trial court's ruling to the contrary and vacate the trial court's termination of Father2's parental rights.

Our decision that the evidence preponderates against a termination of Father2's parental rights does not mean that custody should automatically be vested in him. The issue of custody will require further proceedings in the trial court.

VI.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded for enforcement of that portion of the trial court's judgment which is affirmed herein and for collection of costs assessed below, all pursuant to applicable law. Exercising our discretion, we tax the costs on appeal one-half to the appellant, C.L.R., and one-half to the appellee, DCS.

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CHARLES D. SUSANO, JR., JUDGE